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9 **SUPERIOR COURT OF THE STATE OF ARIZONA**
10 **IN AND FOR THE COUNTY OF MARICOPA**

11 DAVID BURNELL SMITH, a citizen and
12 resident of the State of Arizona,

13 Plaintiff,

14 v.

15 ARIZONA CITIZENS CLEAN
16 ELECTIONS COMMISSION, an agency of
the State of Arizona and the STATE OF
17 ARIZONA, a State of the United States of
America,

18 Defendants.

Case No: CV2005-093310

DEFENDANTS' MOTION TO DISMISS

(Assigned to the Honorable Mark F. Aceto)

19
20 The Citizens Clean Elections Commission and the State of Arizona request the
21 Court to dismiss the Verified Special Action Complaint, pursuant to Rule 12(b)(1) and (6),
22 Arizona Rules of Civil Procedure, for lack of subject matter jurisdiction and for failure to
23 state a claim upon which relief may be granted. This Motion is supported by the
24 Memorandum of Points and Authorities which follows.
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1 vacate in the Verified Special Action Complaint.

2 5. The Commission's Final Order is now *res judicata*, and the Court has no
3 jurisdiction to consider a collateral attack on the final decision of the Commission.

4 6. *Res judicata* also precludes a collateral attack on the constitutionality of
5 portions of the Act. *Hurst v. Bisbee Unified Sch. Dist. No. Two*, 125 Ariz. 72, 75, 607
6 P.2d 391, 394 (App. 1979).

7 **II. Factual Background**

8 Smith ran as a candidate for State Representative, District 7, of the Arizona House
9 of Representatives in the 2004 Primary and General Elections. Smith was certified and
10 ran as a "participating candidate" under the Act, A.R.S. §§ 16-940 to -961, which means
11 he received public monies to fund his campaign. Smith won his election.

12 In accordance with A.A.C. R2-20-209(A), the Commission commenced an
13 investigation of alleged violations of the Act and provided Smith with opportunities to
14 respond and to be heard. Pursuant to A.R.S. § 16-942 and -957, and A.A.C. R2-20-215
15 and A.A.C. R2-20-217, the Commission issued a written Order on March 25, 2005,
16 requiring Smith (1) to pay a civil penalty of \$10,000.00 to the Commission; (2) to forfeit
17 his office of State Representative for District 7; and (3) to repay to the Citizens Clean
18 Elections Fund the amount of \$34,625.09. The Order also advised Smith that he was
19 entitled to request an administrative hearing to contest the Order and to request an
20 informal settlement conference.

21 On April 21, 2005, Smith requested an administrative hearing to contest the
22 Order. An administrative hearing was held on June 22 and 23, 2005 at the Office of
23 Administrative Hearings.

24 Administrative Law Judge ("ALJ") Daniel G. Martin issued his Administrative
25 Law Judge Decision and Recommended Order ("ALJ Decision and Recommended
26 Order") on August 22, 2005, recommending that Smith's appeal be denied and that the

1 Commission's March 25, 2005 Order be affirmed. The ALJ's Decision and
2 Recommended Order was not the final administrative decision in this matter. *See* A.R.S.
3 § 41-1092.08(F).

4 On August 25, 2005, the Commission considered the ALJ's Decision and
5 Recommended Order and, pursuant to A.R.S. § 41-1092.08(B), voted to adopt and accept
6 in full the Recommended Findings of Fact, Conclusions of Law and the Recommended
7 Order as presented by the ALJ. On that date, the Commission issued a Final Order. A
8 copy of the Commission's Final Order is attached hereto as Exhibit 1 and incorporated
9 herein by reference.

10 In the Final Order, the Commission notified Smith that, not later than 30 days
11 after service of the Final Order, he could file with the Commission a motion for
12 rehearing or review. Smith filed a Motion for Rehearing or Review on September 23,
13 2005.

14 On September 26, 2005, before administrative proceedings before the
15 Commission were concluded, Smith filed his Verified Special Action Complaint. In the
16 Verified Special Action Complaint, Smith's request for relief asks the Court to enter an
17 order and judgment "vacating the Commission's March 25, 2005 Disciplinary Order"
18 and an order and judgment "vacating the ALJ's August 22, 2005 Decision upholding the
19 March 25, 2005 Disciplinary Order." The Verified Special Action Complaint does *not*
20 appeal from the Final Order of the Commission dated August 25, 2005.

21 On October 4, 2005, the Commission considered Smith's Motion for Rehearing or
22 Review. Smith appeared in person to argue his Motion. The Commission voted to deny
23 Smith's Motion for Rehearing or Review and issued its denial on October 4, 2005. A
24 copy of the Commission's Denial of Respondent's Motion for Rehearing or Review is
25 attached hereto as Exhibit 2 and incorporated herein by reference. This document was
26 personally served on Smith on October 5, 2005.

1 The Commission's August 25, 2005 Final Order became the final administrative
2 decision in this matter on October 4, 2005, after the Commission issued its denial of
3 Smith's Motion for Rehearing or Review. Pursuant to A.R.S. § 16-957(B), Smith had 14
4 days to appeal the August 25, 2005 Final Order to the Superior Court.¹ The deadline for
5 filing his appeal from the Final Order expired on October 18, 2005.

6 **III. Argument**

7 **A. A Special Action / Declaratory Judgment Complaint is not a Substitute** 8 **for a Timely Appeal from the Final Administrative Decision.**

9 Rule1, Rules of Procedure for Special Actions, provides, in part as follows: "Except
10 as authorized by statute, the special action shall not be available where there is an equally
11 plain, speedy, and adequate remedy by appeal. . . ." Smith had the right to appeal the Final
12 Order of the Commission pursuant to A.R.S. § 16-957(B), after the Commission's August
13 25, 2005 Order became final on October 4, 2005.

14 Smith's first claim for relief is entitled "Declaratory Judgment on
15 Constitutionality." Verified Special Action Complaint at page 27. Smith contends this
16 Court has jurisdiction to determine the constitutionality of various provisions of the Act
17 pursuant to A.R.S. § 12-1831.

18 It is well-settled in Arizona that "[a] party attempting to correct errors in an
19 appealable administrative decision cannot substitute a declaratory relief action for a timely
20 appeal. Nor can such a party avoid the requirements of timely appeal by seeking relief in
21 the nature of mandamus or special action." *Thielking v. Kirschner*, 176 Ariz. 154, 156,
22 859 P.2d 777, 779 (App. 1993) (citations omitted) (trial court correctly dismissed those
23 portions of complaint seeking declaratory relief and special action). *See also Tanner*
24 *Companies v. Arizona State Land Dept.*, 142 Ariz. 183, 187, 688 P.2d 1075, 1079 (App.

25 ¹ "The violator has fourteen days from the date of issuance of the order assessing
26 the penalty to appeal to the superior court as provided in title 12, chapter 7, article 6."

1 1984) (trial court lacked jurisdiction to grant declaratory relief and erred in granting
2 appellees the right to file an amended or supplemental complaint); *Arizona Board of*
3 *Regents v. Harper*, 108 Ariz. 223, 229, 495 P.2d 453, 459 (1972) (students should have
4 sought further review of Residence Committee’s decision under the Administrative
5 Review Act rather than action for declaratory judgment). Therefore, Smith is precluded
6 from obtaining a declaratory judgment via the Verified Special Action Complaint.

7 **B. The Court Lacks Jurisdiction to Review the Administrative Decision**
8 **Because Smith Failed to File a Proper and Timely Complaint Pursuant**
9 **to A.R.S. § 16-957(B) and the JRA.**

10 The right of appeal from the decision of an administrative agency exists only by
11 force of statute, and such right is limited by the terms of the applicable statutes. *Guminski*
12 *v. Ariz. State Veterinary Med. Examining Bd.*, 201 Ariz. 180, 182, 33 P.3d 514, 516 (App.
13 2001); *Ariz. Comm’n of Agriculture and Horticulture v. Jones*, 91 Ariz. 183, 187, 370 P.2d
14 665, 668 (1962). There is no automatic right to appeal from the decision of an
15 administrative agency, such appeal being a creature of statute, and therefore, the
16 authorizing statute must be *strictly* followed or there is no jurisdiction in the appellate
17 court to consider the appeal. *RCJ Corp. v. Ariz. Dept. of Revenue*, 168 Ariz. 328, 330, 812
18 P.2d 1146, 1148 (Tax 1991). Failure to seek review of an administrative decision within
19 the time and *in the manner* provided by statute results in the decision becoming final and
20 not subject to subsequent judicial review for legal error or factual insufficiency. *State ex*
21 *rel. Dandoy v. City of Phoenix*, 133 Ariz. 334, 337, 651 P.2d 862, 865 (App. 1982).

22 A.R.S. § 12-902(B) provides that unless review of an administrative decision is
23 sought in the time and manner prescribed, “the parties to the proceeding before the
24 administrative agency *shall be barred* from obtaining judicial review of the decision.”
25 (Emphasis added.) Rule 4, Rules of Procedure for Judicial Review of Administrative
26 Actions, provides:

1 Plaintiff's complaint shall be filed within the time required by
2 A.R.S. § 12-904 *or other applicable law* and shall be captioned
3 "Complaint for Judicial Review of Administrative Decision." The
4 complaint shall conform to the requirements of A.R.S. §§ 12-904, 12-905,
5 12-909 and any other applicable law.

6 (Emphasis added.) A.R.S. §16-957(B) is the "other applicable law" governing the time for
7 filing appeals from the Commission's Final Order. This statute provides that an appeal
8 must be filed within 14 days by following the procedures of A.R.S. §§ 12-901 to -914.

9 Smith failed to follow the requirements of the JRA and failed to comply with the
10 statutory deadline for seeking judicial review of the Commission's Final Order. Smith
11 filed a "Verified Special Action Complaint" rather than a "Complaint for Judicial Review
12 of Administrative Decision."

13 Failure to file a Complaint for Judicial Review within the time limits is
14 jurisdictional. *Thielking*, 176 Ariz. at 156, 859 P.2d at 779; *State ex rel. Dandoy*, 133 Ariz.
15 at 337, 651 P.2d at 865 (if a party fails to seek timely review, the administrative decision
16 becomes final). The Commission's Final Order became effective and *res judicata* when
17 Smith failed to file a timely and proper appeal from the Final Order. *Hurst*, 125 Ariz. at
18 75, 607 P.2d at 394 (App. 1979). "This principle applies even to alleged constitutional
19 errors which might have been corrected on a proper application to the court which has
20 jurisdiction of the appeal." *Id.* When allegations of unconstitutionality are improperly
21 asserted in a special action, claims of denials of constitutional rights are "no more than a
22 collateral attack" on the administrative agency's decision. *Id.* Because the Court lacks
23 jurisdiction to consider the Verified Special Action Complaint, it must be dismissed.

24 **IV. Conclusion**

25 Smith did not file a timely or proper "Complaint for Judicial Review of
26 Administrative Decision" to challenge the Final Order of the Commission dated August
25, 2005, which became effective on October 4, 2005. No timely appeal having been

1 taken, this Final Order became final and is now *res judicata*. The Verified Special Action
2 Complaint is nothing more than an improper collateral attack on a decision of an
3 administrative agency. Because the Court lacks jurisdiction of this matter, and the
4 Verified Special Action Complaint fails to state a claim for which relief may be granted,
5 the Defendants respectfully request the Court to:

- 6 1. Dismiss the Verified Special Action Petition with prejudice; and
- 7 2. Grant the Defendants such other relief as may be appropriate.

8 **RESPECTFULLY SUBMITTED** this ____ day of _____ 2005.

9
10 Terry Goddard
Attorney General

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13 _____
Diana L. Varela
Assistant Attorney General
14 Jessica G. Funkhouser
Special Counsel
15 Attorneys for Citizens Clean Elections
Commission

16 **ORIGINAL** and one copy of the
17 foregoing filed this 26th day of
October 2005 with:

18 Clerk of the Court
Superior Court of Maricopa County
19 222 E. Javalina Ave.
20 Mesa, Arizona 85210-6201

21 **COPY** of the foregoing hand-delivered
this 26th day of October 2005 to:

22 The Honorable Mark F. Aceto
Superior Court of Maricopa County
23 222 E. Javalina Ave.
24 Mesa, Arizona 85210-6201
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Copy of the foregoing hand-delivered
this 26th day of October 2005 to:

David L. Abney
Skousen, Skousen, Gulbrandsen & Patience, P.C.
414 East Southern Avenue
Mesa, Arizona 85204
Attorney for Plaintiff
Fax: 480-833-7146

By: _____
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